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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 207

WALTER W. MEEK,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE
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October Term, 1968

No. 1492 Misc.

WALTER W. MEEK,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

THE STATE OF ARIZONA, by its Attorney General, GARY K. NELSON, by his assistant CARL WAAG, pursuant to Rule 24, Rules of the Supreme Court, 28 U.S.C., responds to the Petition for Writ of Certiorari heretofore filed.

OPINION BELOW, JURISDICTION, QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS AND STATEMENT OF THE CASE

Respondent accepts petitioner's presentation of the above matters in his petition.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

As to Questions 1 and 2:

Petitioner bases much of his argument on the proposition that the First Amendment guarantee of a free press implies the corollary that the press must not be hampered in gathering newsworthy matter. Petitioner's corollary would condemn the window-peeping statute with the same taint of unconstitutionality he seeks to attach to Rule 27, Arizona Rules of Criminal Procedure, 17 A.R.S.; it would destroy

every notion of the sanctity of a man's home and the privacy of his papers and conversations. The search for news would gain precedence over the individual's right to be let alone, as well as his right to a fair trial. The public has no right to know the private business of any individual.

The First Amendment prohibition against congressional interference with freedom of the press speaks, as do all the clauses of the Bill of Rights, in terms of restricting the power of the State in dealing with its subjects. The Bill of Rights is a charter of freedoms which are guaranteed to the citizens by specific curtailments of the powers of the sovereign.

Kovach v. Maddux, 238 F.Supp. 835 (1965) is not in point because it deals

with the usurpation of a right of privacy by a governmental body. The instant case deals with a rule granting to a citizen the right to invoke a right of privacy when the sovereign is inquiring into his putative misbehavior.

Arizona does not argue that the State has or should have, under any circumstances whatsoever, the power to close any proceeding, judicial or otherwise, from the scrutiny of the public or from the press. What is advocated is the accused's right to require that the State's inquiry into the question whether he should be held to answer the State's charge of wrongdoing be conducted in private so far as possible; and that an accused be protected from exhibition of his misfortune, for the titillation of the prurient interest of the reading public.

Whether such a right abates on a finding that there is probable cause to hold him is another question, not before this Court.

The accused in the preliminary hearing which the petitioner herein sought to attend was entitled to a fair trial. He was entitled to the attendance of witnesses. No trial attorney can deny that witnesses to some matters are easier to come by when a hearing is to be private than when it is to be conducted in public. If an accused's right to have witnesses in his behalf is to be balanced against the appellant's right to know the details of his alleged misdeeds, there can be no discussion as to which right must give way. If the proposition were open to discussion, that discussion would be best conducted in the legislative branch of our

government. If the rights of one group are to be sacrificed to the interests of another, it is best that those rights and interests be weighed where the widest possible discussion can be had and where the influence of the largest possible number of citizens can be brought to bear on the decision.

We deal here with a preliminary hearing, a statutory procedure tolerated as a substitute for the constitutionally required grand jury indictment. When this Court ruled in Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884) that information and preliminary hearing would suffice as due process in the stead of the indictment of a grand jury, it did not rule on a procedure where the accused would be

deprived of the shelter of the grand jury's secrecy. The Court said:

> "* * *
> The Supreme Court of California, in the judgment now under review, followed its own previous decision in Kalloch v. Superior Ct., 56 Cal. 229, in which the question was deliberately adjudged. Its conclusion was there stated as follows:
>
> 'This proceeding, as (it) is regulated by the Constitution and laws of this State, is not opposed to any of the definitions given of the phrases 'due process of law' and 'the law of the land;' but, on the contrary, it is a proceeding strictly within such definitions; as much so in every respect as is a proceeding by indictment. It may be questioned whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity of protection to which he is entitled under the law.'
> * * *" (p. 233)

In deciding Jones v. Robbins, 8 Gray

329 (Mass. 1857), quoted in Hurtado. Chief Justice Shaw writing for the Court stated:

> "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." (Emphasis added) (p. 344)

Unless Hurtado is to be reversed so that the secrecy of the grand jury will again cloak all persons accused in state courts until such time as probable cause has been established, this Court must not deprive the accused of the option to choose a secret preliminary hearing.

The public has, as petitioner argues,

a legitimate interest in the conduct of preliminary hearings, as well as in trials, but that interest is as well protected by a rule permitting the accused who desires an open hearing to have it and preserving the right to exclude press and public to the accused who deems such exclusion desirable. It matters not whether he desires privacy in the interests of a fair hearing, or in order to protect his reputation in the face of baseless accusations.

Petitioner claims to be unable to see a distinction between his right to sit in the park and his right to sit in the courtroom during a preliminary hearing into a charge of a heinous crime. The distinction lies in the fact that one accused of heinous

crime has rights which are in conflict with those of petitioner. Either the accused must suffer the injury of adverse publicity which may so affect the community as to make an impartial jury difficult or impossible to select, the injury of being unable to persuade witnesses to come forward in his behalf, the injury of having his most secret and private misdeeds become public property, or the injury of having all the world informed of a baseless accusation against him; or the appellant must suffer the injury of being confined to reporting the conduct of some other matter in another courtroom where the accused desires the presence of the press at the public hearing to which he is entitled.

The State denies that the Court has the power petitioner would concede it to

close a hearing or trial other than on the request of the accused. The accused has a right to public trial which may not be abrogated for the Court's reasons. He also has a right to a private hearing, which is just as important to him and just as much a part of due process as the other right.

The instant case deals with conflicting rights of two citizens; one must give way to the other. Meek must leave the courtroom; or the accused must suffer what he deems an unfair preliminary hearing, he must have the fairness of his ultimate trial jeopardized by publicity, and he must suffer the embarrassment of public condemnation before it has been judicially decided that there is probable cause to arraign him.

The choice of which shall prevail

should not be in question, but if the rights of an accused are to be abrogated in favor of the appellant's right to enrichment by his misery, (petitioner's claim that he is deprived of property without due process) or the public's right to know what the accused has been up to before his formal arraignment, that abrogation should not be undertaken by this Court. It should be left to the Legislature.

As to Question 3:

The question whether petitioner was deprived of some right by due process only arises if he establishes that he has such a right in the first place. The decision of the Arizona Court of Appeals was that petitioner had no such right; therefore, no due process question was involved in the case.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

CARL WAAG
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the petitioner in the foregoing case by forwarding two (2) exact copies of response to petition for writ of certiorari in a sealed envelope, first class postage prepaid, and depositing same in the United States mail addressed to:

Mark Wilmer
Snell and Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Petitioner

this _____ day of July, 1969.

_____

SUBSCRIBED AND SWORN to before me this _____ day of July, 1969.

_____
Notary Public

My commission
expires: